

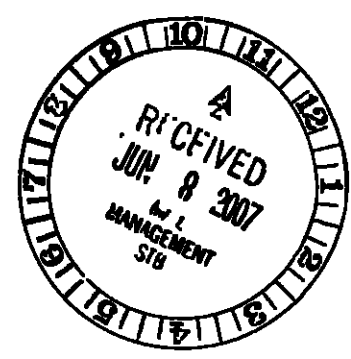
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BEFORE THE
SURFACE TRANSPORTATION BOARD

219496

NORTHERN AND BERGEN RAILROAD, L.L.C.)
ACQUISITION EXEMPTION)
A LINE OF RAILROAD OWNED BY) Finance Docket No 35020
NEW YORK & GREENWOOD LAKE RAILWAY)
)

COMMENTS OF JAMES RIFFIN

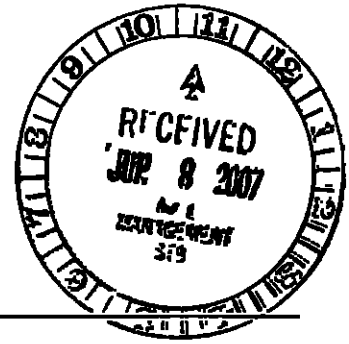


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Public Record

Dated: June 7, 2007

James Riffin
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SURFACE TRANSPORTATION BOARD



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ACQUISITION EXEMPTION)
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)

COMMENTS OF JAMES RIFFIN

1 Notice is hereby given that James Riffin ("Riffin"), a Class III Carrier, intends to participate as a party of record in the above entitled proceeding. Please direct all matters pertaining to this proceeding to: James Riffin; 1941 Greenspring Drive; Timonium, MD 21093. Telephone No.: (443) 414-6210

BACKGROUND INFORMATION

2. On April 26, 2007, Northern and Bergen Railroad, L L.C , ("NBR") a non-carrier chartered in the State of New Jersey, filed a Notice of Exemption ("NOE") to acquire (via purchase) and operate a 1.1 mile line of railroad located in Bergen and Passaic Counties, New Jersey. The line of railroad is presently owned and operated by the New York and Greenwood Railway company ("NYGLR"). NYGLR received authority to acquire the line of railroad from Conrail, and to operate the line of railroad, on August 14, 1996. See STB Docket No AB-167 (Sub-No. 1151X), *Conrail – Abandonment Exemption – In Bergen and Passaic Counties, New Jersey*, served August 14, 1996. NBR's NOE was scheduled to become effective on May 26, 2007

3. On May 16, 2007, the New Jersey Department of Environmental Protection ("NJDEP"), filed a petition asking the Board to stay the effective date of the exemption. NBR filed a reply in opposition to a stay on May 18, 2007. NJDEP filed a supplemental pleading to its request for a stay on May 23, 2007

4 On May 17, 2007, Mr. D.C. Agrawal, Assistant Executive Director, Corporate Strategy, Policy, & Contracts, New Jersey Transit ("NJT"), filed a comment. In his comment, Mr Agrawal made the following representations:

A. New Jersey Transit purchased the underlying real estate of the "Bergen County Line" from Conrail, including the real estate under a siding located in Garfield, NJ ("Garfield Siding").

B NYGLR leased the Garfield Siding from NJT NYGLR and Norfolk Southern used the Garfield Siding to interchange rail cars The Garfield Siding lease expired (no date of expiration was given). The Garfield Siding lease was not assignable. NJT was uncertain whether it would lease the Garfield Siding to NBR, and was uncertain whether NJT would permit NBR to use the Garfield Siding for freight railroad purposes.

C. NJT provides intercity rail passenger services.

5 In a Decision served on May 25, 2007, Chairman Nottingham stayed the effective date of NBR's NOE until June 26, 2007.

ISSUES

6. The primary issue before the Board may be succinctly stated as follows

Has any evidence been presented which would indicate the acquisition and operation of the line of railroad would be inconsistent with the public convenience and necessity?

7. The following secondary issues have also been raised:

A. Has NBR fully complied with the procedures enumerated in 49 CFR §1150.31, *et seq?*

B Is a NOE proceeding, or a Petition for Stay proceeding, an appropriate proceeding to address the concerns raised by NJDEP?

C. Does NJT have the authority to refuse to permit NBR to use the Garfield Siding for rail freight purposes?

D Did NJT's acquisition of the "Bergen County Line" comply with the requirements enumerated in *State of Maine*, ICC Fin. Doc. Nos. 31847, 31829, 8 I.C.C. 2d 835 (1991), and *Orange County Transp - Exempt - Atchison, T & SF Ry Co*, 10 I.C.C. 2d 78, 83-87?

STANDARDS FOR GRANTING A STAY

8. The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. F.D. 33887, *Illinois Central R Co – Construction and Operation Exemption – In East Baton Rouge Parish, LA, slip op* (Service Date February 20, 2002), citing *Washington Metro Area Transit Comm'n v Holiday Tours, Inc*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Assoc v FPC*, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for a stay. *Id*

COMMENTS – PRIMARY ISSUE

9. 49 U.S.C. §10901 (c) states the Board **shall** authorize the acquisition and operation of a line of railroad unless the Board finds the acquisition and operation of the line of railroad would be inconsistent with the public convenience and necessity.

10 49 U.S.C. §10502(a) states the Board **shall** exempt a transaction whenever the Board finds detailed scrutiny of the acquisition is not necessary to carry out the transportation policy of 49 U.S.C. §10101; and either (A) the transaction or service is of limited scope, or (B), detailed scrutiny is not needed to protect **shippers** from the abuse of market power

11 Granting NBR's NOE would be in conformity with the following 49 U.S.C. §10101 rail transportation policies:

- (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(4) to ensure the ... continuation of a sound rail transportation system . , to meet the needs of the public ..

(7) to reduce regulatory barriers to entry into and exit from the industry;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

12. Granting NBR's NOE would not contravene any other rail transportation policy.

13 A careful reading of NBR's NOE would reveal the NOE fully complied with **all** of the requirements specified in 49 CFR §1150.31 *et seq*

14 To grant a stay, the Board must find that the moving party, NJDEP, has presented sufficient evidence to indicate that NJDEP would prevail on the merits of its case: namely that NBR did not fully comply with the requirements specified in 49 CFR §1150.31 *et seq* , or that granting NBR authority to acquire the line would be inconsistent with the public convenience and necessity; that granting authority to acquire the line would violate some portion of the transportation policy enumerated in 49 U S C §10101, and that either the shippers on line needed protection from an abuse of market power or that the acquisition was not limited in scope In addition, NJDEP would have to establish that NJDEP would be irreparably harmed if the stay was not granted, that NBR, NYGLR, and the shippers on the Line, would not be irreparably harmed if the stay were to be granted,

15 NJDEP has presented no evidence NBR's acquisition and operation of the line would be inconsistent with the public convenience and necessity. NJDEP has presented no evidence indicating detailed scrutiny of NBR's acquisition and operation of the line is necessary to carry out the transportation policy found in 49 U S.C §10101 NJDEP has presented no evidence that any of the shippers on the line need to be protected from the abuse of market power, or that NBR's acquisition is not of limited scope. NJDEP has presented no evidence that it would be irreparably harmed if the stay was not granted, has presented no evidence that NBR, NYGLR and the shippers on the Line would NOT be irreparably harmed by granting the stay, and has

presented no evidence that granting the stay would be in the public interest.

16. Riffin would argue NJDEP has not presented sufficient evidence to indicate it has carried its burden of proof to justify any further stay of NBR's NOE.

COMMENTS – SECONDARY ISSUES

17. NJDEP's primary concern appears to be its perceived inability to subject a construction and demolition debris ("C&D") transfer facility located on the Line, to its regulatory authority. Riffin would argue a Petition to Stay a NOE is not an appropriate way to address this jurisdictional issue. NBR proposes to acquire an existing line of railroad, together with all assets owned by the railroad that presently owns the line of railroad. 49 U.S.C. §10901 grants the Board authority to authorize the acquisition of a line of railroad. The sole purpose of the NOE is to receive authority to acquire a line of railroad. The Board has no jurisdictional authority to proscribe a carrier from selling non-line of railroad assets, nor does the Board have any jurisdictional authority to prohibit a prospective carrier from acquiring non-line of railroad assets. Riffin would argue the only question properly before the Board is whether it would be inconsistent with the public convenience and necessity for NBR to acquire this particular line of railroad. All other questions would have to be raised and dealt with in some other type of proceeding.

18. Since the Board must grant authority prior to acquiring a line of railroad, all acquisitions of lines of railroad are subject to scrutiny by the Board. Occasionally, in the course of a proceeding, the Board may become aware of an unauthorized acquisition of a line of railroad. When this has happened, the Board may *sua sponte* scrutinize an apparent unauthorized acquisition of a line of railroad. See, for example, *Southern Pacific Transportation Company – Abandonment Exemption – Los Angeles County, CA*, 8 I.C.C. 2d 495 (1992), Petition to Reconsider, denied 9 I.C.C. 2d 385 (1993).

19. Mr. Agrawal stated NJT acquired the "Bergen County Line," and the associated Garfield Siding. Riffin was unable to find an Interstate Commerce Commission ("Commission") or Board decision which granted NJT authority to acquire the "Bergen County Line," to acquire the Garfield Siding, or to acquire any line in Bergen County, NJ. In *State of Maine, op cit*, the Commission reiterated that if a State desired to acquire a line of railroad, it first had to submit the

proposed acquisition to the Commission, so that the Commission could ascertain whether the acquisition required prior Commission approval. It would appear NJT did not seek, nor did it obtain, Commission, or Board, approval to acquire the "Bergen County Line," or to acquire the Garfield Siding.

20. Had NJT sought Commission approval prior to acquiring the "Bergen County Line," or the Garfield Siding, the Commission would have required NJT grant a **permanent, assignable freight easement** in the line and siding prior to its acquisition. See *State of Maine, op cit* Mr. Agrawal's comment, that there was **no permanent, assignable freight easement** associated with the Garfield Siding, would suggest that had prior Commission authority been sought, it would have been denied.

21. Given that there is no record indicating NJT ever received authority to acquire the "Bergen County Line," or to acquire the Garfield Siding, and given that there is no permanent, assignable freight easement associated with the "Bergen County Line," or the Garfield Siding, Riffin would argue that the Board should direct NJT to submit evidence to the Board showing that NJT's acquisition of the "Bergen County Line" and the Garfield Siding had been authorized by the Commission, or in the alternative, permit the institution of a proceeding wherein, via discovery, it may be ascertained whether NJT's acquisition of the "Bergen County Line" was ever authorized, and if not, whether NJT's acquisition of the line should be set aside.

Respectfully submitted,



James Riffin

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2007, a copy of the foregoing Comments of James Riffin, was served by e-mail, upon the parties indicated below.



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